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IN THE

Supreme Court of the United States

October Term, 1941

No. 233

314-645

FREDERIC H. PENN, doing business under the name and style of SUPERLITE COMPANY,

Petitioner,

vs.

NOVADEL-AGENE CORPORATION,

Respondent.

TEX-O-KAN FLOUR MILLS COMPANY,

Petitioner,

vs.

NOVADEL-AGENE CORPORATION,

Respondent.

PETITION OF FREDERIC H. PENN AND TEX-O-KAN FLOUR MILLS COMPANY FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

SAMUEL E. DARBY, JR.,
Counsel for Petitioners.

ROBERT A. RITCHIE,
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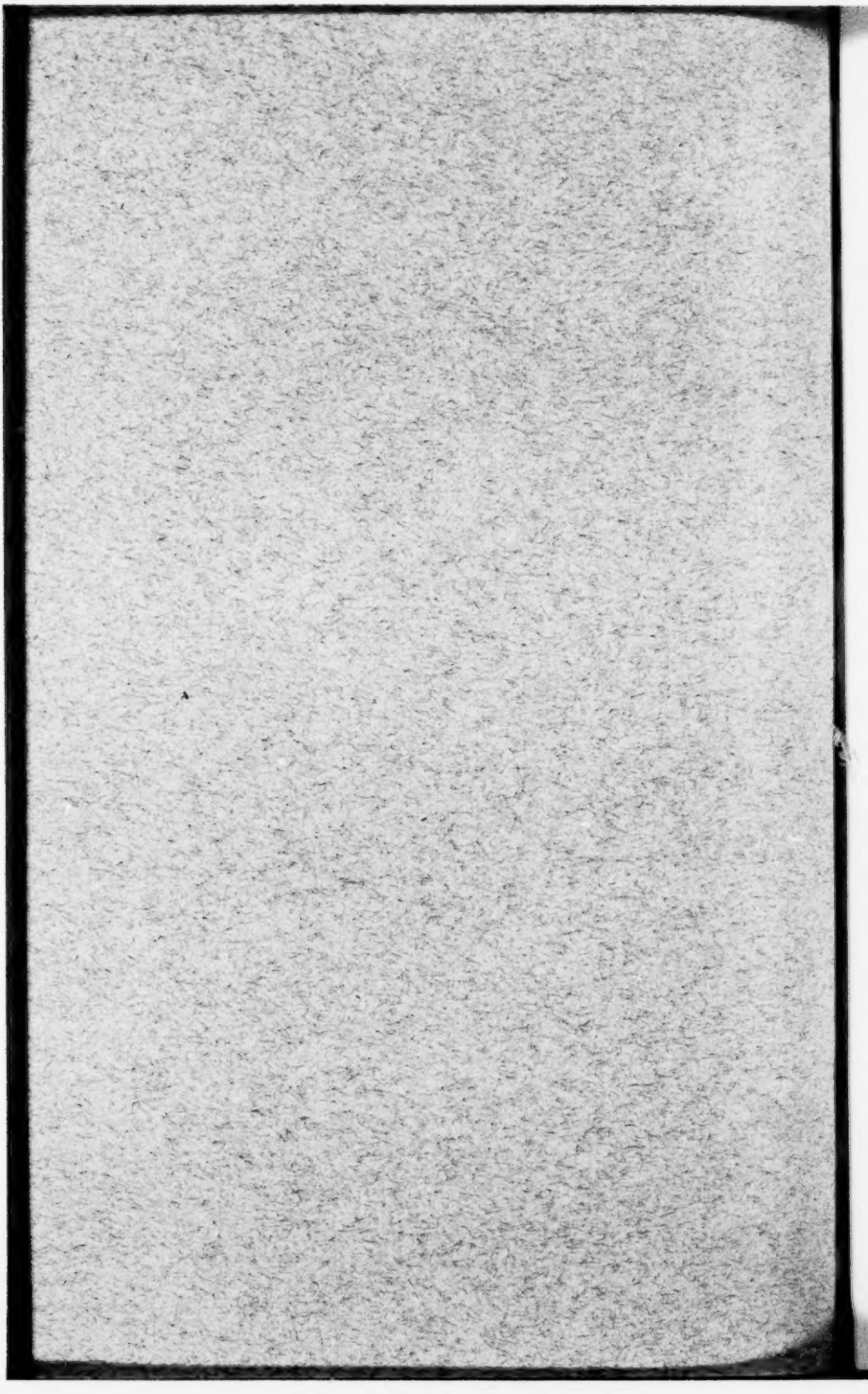
Of Counsel.



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PETITION OF FREDERIC H. PENN AND TEX-O-KAN FLOUR MILLS COMPANY FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Frederic H. Penn and Tex-O-Kan Flour Mills Company, respectfully pray for a writ of certiorari to the Circuit Court of Appeals for the Fifth Cir-

cuit, to review the judgment of that Court entered on the 16th day of May, 1941 (petition for rehearing denied June 16, 1941). A transcript of the record in the case, including the proceedings in said Circuit Court of Appeals, is furnished herewith in accordance with the rules of this Court.

Summary and Short Statement of the Matter Involved.

1. Respondent (plaintiff below), Novadel-Agene Corporation, is the owner of Sutherland Patent No. 1,539,701, directed to the alleged "process" of mixing an unpatented powdered, chemical compound with an edible cereal, such as flour, to bleach the flour and improve its baking qualities; as well as the composition of matter comprising the "mixture" formed of the flour and the unpatented chemical compound (R. 247).

2. Respondent was likewise the owner of a prior patent (No. 1,380,334) issued to the same patentee, Sutherland, which was reissued as Patent No. 16,116, and which expired on May 31, 1938. This expired patent also was directed to the same "process" of mixing the same powdered, chemical compound with an edible cereal, such as flour, to bleach the flour and improve its baking qualities; as well as the composition of matter comprising the "mixture" formed of the flour and the same chemical compound (R. 365).

3. Although the applications of Sutherland for these two separate patents for the same invention were copending in the Patent Office, and all of the claims in the application for the patent which issued as No. 1,539,701 were allowed on January 24, 1921, whereby both patents could have

been issued at the same time, respondent deliberately refrained from allowing the second application to issue as a patent for a period of more than four years thereafter, to thereby prolong the monopoly of the patent for that period of time after the expiration of the reissue patent (File History, Defendant's Exhibit 5, Physical).

4. After the expiration of the Sutherland reissue patent on May 31, 1938, petitioner, Frederic H. Penn, engaged in the manufacture of a chemical compound (commercially identified by the name "Superlite"), and the sale thereof to flour millers throughout the United States for use in bleaching and improving the baking qualities of the flour produced by them.

5. Petitioner's "Superlite" product was different from and superior to any bleaching compound available on the market, enabling the millers to effect a saving of 66⅔% in the cost of bleaching composition, and a reduction of the ash content in the flour (a deleterious content upon the quantative presence of which the flour is graded) from 1/100th of a per cent to 1/1000th of a per cent (R. 154).

6. On August 16, 1940, respondent instituted suit against petitioner, Frederic H. Penn, in the United States District Court for the Northern District of Texas, charging *contributory* infringement of the Sutherland Patent No. 1,539,701, by reason of his manufacture and sale of "Superlite" (R. 2-12).

7. On December 11, 1940 respondent instituted suit in the same Court against petitioner, Tex-O-Kan Flour Mills Company—a miller customer of Penn—for *direct* infringe-

ment of the Sutherland Patent No. 1,539,701, by reason of the use of "Superlite" in treating flour (R. 39-49).

8. Both Penn and the Tex-O-Kan Company raised as a defense in their respective suits that the expired Sutherland Reissue Patent No. 16,116, and the Sutherland patent in suit No. 1,539,701, were for the same invention, and that upon the expiration of the reissue patent on May 31, 1938, the public, of which they were a part, acquired the right to utilize the "process" of mixing edible cereal products with a chemical compound, and to form the alleged "mixture" therebetween, for the purpose of bleaching milling products and improving their baking qualities, whereby neither of the petitioners was guilty of either direct or contributory infringement by the manufacture and sale of the chemical compound or the use thereof for its intended purpose.

9. The two causes were consolidated and tried as one (R. 1).

10. At the conclusion of the trial, Judge ATWELL, on the evidence before him, *found as a fact* that the expired reissue Patent No. 16,116, and the patent in suit were for the same invention, and that the monopoly claimed for the patent in suit (No. 1,539,701) expired with the expiration of the reissue patent on May 31, 1938, wherefore the second Sutherland patent was invalid (R. 236-232). In consequence he decreed the dismissal of the complaints (R. 387, 388).

11. The Fifth Circuit Court of Appeals reversed the judgment of the Texas District Court and sustained the validity of the second Sutherland patent—not because of any asserted error of *fact* based on the *evidence* before it, or any asserted error in *conclusion of law* resulting therefrom

—but *solely* because of the doctrine of *comity,* inasmuch as the Court of Appeals for the Second Circuit, *nearly twelve years ago,* in litigation brought on the same patent against *another* defendant with whom petitioners were in no way connected, and on a wholly *different* record (not before the Fifth Circuit Court of Appeals, physically or otherwise) had passed adversely on a defense of "double patenting" there raised.*

12. This action of the Court of Appeals necessarily involved setting aside and ignoring the *finding of fact* by the District Court that the two patents were for the same invention, in complete disregard of the evidence in the record which supported the finding of the District Court, and without reference to *any* evidence in the case which would support a different conclusion. Indeed, the Court of Appeals baldly substituted the doctrine of comity for evidence, findings of fact and conclusions of law based thereon, whereby petitioners have been held to be bound by a decision rendered nearly twelve years ago in a litigation in which they took no part, and on a record not here before the Court in any manner or form.

13. Because this action of the Court of Appeals has deprived petitioners of their constitutionally guaranteed day in Court, and an adjudication of the merits of the defense *they* have both raised, on the evidence *they* have adduced; and because the Court of Appeals has set aside and ignored the dispositive finding of fact of the Trial Court which should have been regarded as "unassailable"; petitioners seek a review of the decision of the Court of Appeals for the Fifth Circuit and of the question of validity of Sutherland Patent

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Novadel Process Corporation v. *J. P. Meyer & Co.,* 1929, 35 Fed. (2d) 697, C. C. A. 2nd.

No. 1,539,701, in view of the prior patent issued to the same patentee, for the same invention, which expired on May 31, 1938.*

Reasons Relied Upon for the Grant of a Writ of Certiorari.

The discretionary power of this Court is invoked upon the following grounds:

1. Because of the public importance of the subject matter of the case, as well as of the public importance of whether or not the monopoly of a patent which has passed into the public realm by the expiration of the patent, can be continued to be enforced by means of a subsequent, unexpired patent, issued to the same patentee, for the same invention.

2. Because the Court of Appeals for the Fifth Circuit has decided an important Federal question in a way that

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* The suits also involved Kroeber Patent No. 1,555,805. Both of the Courts below held this patent to be invalid. Likewise, there were other defenses raised to the Sutherland patent, as to one of which the Court of Appeals below has directed further proceedings to be had in the District Court. The present petition is concerned with none of those matters, and, if granted, and the error of the Court of Appeals corrected, the review here sought will be completely dispositive of the litigations, requiring the dismissal of the complaints.

is in direct conflict with the applicable decisions of this Court.

3. Because of the irreconcilable conflict of opinions of the Courts below wherein the Court of Appeals has substituted the doctrine of comity for a dispositive finding of fact by the Trial Court, which finding was not and could not have been found to be erroneous on the record before the Court, and should have been regarded as "unassailable".

4. Because petitioners have been deprived of their constitutionally guaranteed right to an adjudication of the sufficiency and justice of their defense to a charge of patent infringement.

WHEREFORE your petitioners respectfully pray that a writ of certiorari issue out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Fifth Judicial Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full transcript of the record and all proceedings of the Court of Appeals had in this case, to the end that this case may be reviewed and determined by this Court; and that the judgment of the Court of Appeals be reversed in so far as it found validity for Sutherland Patent No. 1,539,701;

and that petitioners may be granted such other and further relief as may seem proper.

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Dated: New York, N. Y.
July 1, 1941.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the District Court is reported in 48 U. S. P. Q. 698, and is reproduced in the Record at pages 236 to 242, inclusive.

The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported in 49 U. S. P. Q. 520, and will be found in the Record at pages 396 to 402.

Jurisdiction.

The grounds for jurisdiction are:

1. The date of the judgment to be reviewed is May 16, 1941, rehearing denied June 16, 1941.
2. The judgment was rendered in a civil action brought under the patent statutes to determine the issues of validity and infringement of Letters Patent of invention.
3. The statute under which jurisdiction is invoked is 240(a) of the Judicial Code, 28 U. S. C. A. 347, as amended by the Act of February 13, 1925.
4. Cases believed to sustain the jurisdiction are:

   Leitch Manufacturing Company v. *Barber Company,* 302 U. S. 458;

   Carbice Corp. v. *American Patents Development Corp.,* 283 U. S. 27;

   DeForest Radio Co. v. *General Electric Co.,* 283 U. S. 664.

Statement.

The facts are sufficiently stated in the petition.

Specification of Errors.

The errors which petitioners will urge, if the petition for certiorari is granted, are that the Circuit Court of Appeals for the Fifth Circuit erred

1. in sustaining Sutherland Patent No. 1,539,701 as valid;

2. in reversing the District Court's judgment that Sutherland Patent No. 1,539,701 is invalid;

3. in setting aside a dispositive finding of fact of the District Court, and predicating such action on the doctrine of comity rather than on the record before it;

4. in failing to affirm the judgment of the District Court that the alleged invention of Sutherland Patent No. 1,539,701 passed into the public realm on May 31, 1938, upon the expiration of the prior reissue Patent No. 16,116, granted to the same patentee for the same invention.

Summary of Argument.

The points of argument follow the reasons relied upon for the grant of a writ of certiorari, and are stated on pages 6 and 7 of the petition as well as in the index hereto. For the sake of brevity they are omitted at this point.

POINT I.

The subject matter of the litigation is of great public importance, as is also the question of whether or not the monopoly of a patent which has passed into the public realm by expiration thereof, can be continued to be enforced by means of a subsequent, unexpired patent, issued to the same patentee for the same invention.

The subject matter of this case consists of a necessary and universally used treatment of flour for making bread—a necessity of life. It is believed to be unnecessary to say more to show the public importance of the subject matter. A patent right sought to be enforced as a dominating factor relative to one of life's necessities, and which thereby reaches and affects every man, woman and child in the United States, warrants scrutiny by this Court as to its validity.

Of no lesser public importance is the question here presented which goes to the very heart and foundation of our patent system. The elementary consideration upon which a patent grant vests in its owner the right of exclusion for a period of seventeen years is the condition that the public shall be free to use the invention of the patent at the end of that seventeen year period. Here, by the opinion of the Court of Appeals below, a *subsequent* patent for the *same* invention, issued to the *same patentee,* has extended the monopoly for more than four years after the expiration of the first patent granted therefor, thus nullifying the presumed beneficial effect to the public of the patent statute, and depriving the public of the right to practice and utilize the invention of the patent upon its expiration.

There can be no serious dispute as to the facts bearing on this question. The District Court, after an exhaustive trial, found as a *fact* that the expired Sutherland patent and the unexpired Sutherland patent in suit were for the *same* invention, *and that on May 31, 1938 this common invention passed into the public realm* upon expiration of the first patent. *The Court of Appeals did not disturb that finding of fact.* As a principle of law it should not have done so; as a matter of proof, on the record before it, it could not have done so. Although it is believed that such finding of fact of the Trial Court is sufficient for the purposes of this petition, merely by way of illustration of the evidence upon which the District Court based its finding we here reproduce, in parallel columns, illustrative claims from both of the patents.

Claim 32 of the Expired Reissue Patent	*Claim 10 of the Patent in Suit*
1. As a new material of manufacture, an edible milling product carrying admixed therewith	An intimate mixture comprising a pulverulent cereal milling product in its normal substantially dry condition incorporated with
2. a portion of a 'true peroxid' corresponding to not substantially more thereof than is necessary to bleach said product and to improve its baking qualities.	an exceedingly small percentage of a true peroxid as such, such peroxid having the property of bleaching the said milling product.

From this comparison, it will be seen that there is complete identity of subject matter, language, elements, proportions, and purpose.

Apparently because of the indisputable character of the evidence before it, the Court of Appeals below neither criti-

cized, modified, nor reversed the fact finding of the Trial Court. Instead, the Court of Appeals substituted for this dispositive finding of fact the doctrine of *comity* based on a decision by the Court of Appeals for the Second Circuit, rendered nearly twelve years ago, under wholly different circumstances, and prior to the expiration of the first Sutherland patent, in a litigation in which the defendants in the present cause were not involved, and on a record which was not before it. It is submitted that a decision of such character and of such far reaching effect, striking down, as it does, the fundamental principle of the patent statute, and depriving the public of rights assured to it by the statute, is of such public importance as to warrant review by this Court.

POINT II.

The Court of Appeals below has decided an important Federal question in a way that is in direct conflict with the applicable decisions of this Court.

Both as a matter of principle, as well as of law and precedent, the decision of the Court of Appeals below is manifestly erroneous. With the fact found by the Trial Court that the two Sutherland patents are for the same invention, which finding was not disturbed by the Court of Appeals below, the applicable law established by the prior decisions of this Court is clear and unequivocal. Thus, in *James* v. *Campbell*, 104 U. S. 356, this Court said:

> "It is hardly necessary to remark that the patentee could not include in a subsequent patent any invention embraced or described in a prior one granted to himself, any more than he could an invention embraced or described in a prior patent granted to a

third person. Indeed, not so well; because he *might* get a patent for an invention before patented to a third person in this country, if he could show that he was the first and original inventor, and if he should have an interference declared." *

Again, in *Miller* v. *Eagle Manufacturing Co.*, 151 U. S. 186, this Court said (p. 198):

> "The result of the foregoing and other authorities is that no patent can issue for an invention actually covered by a former patent, especially to the same patentee, although the terms of the claims may differ; that the second patent, although containing a broader claim, more generical in its character, than the specific claims contained in the prior patent, is also void; but that where the second patent covers matter described in the prior patent essentially distinct and separable from the invention covered thereby, and claims made thereunder, its validity may be sustained.
>
> "In the last class of cases it must distinctly appear that the invention covered by the later patent was a separate invention, distinctly different and independent from that covered by the first patent; in other words, it must be something substantially different from that comprehended in the first patent. It must consist in something more than a mere distinction of the breadth or scope of the claims of each patent. If the case comes within the first or second of the above classes, the second patent is absolutely void."

These clear statements of the law have not been altered or modified throughout the years which followed their enun-

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* Emphasis ours in this brief.

ciation, and have been consistently followed by the lower courts.* No doctrine of lesser importance in law, or from the viewpoint of the public interest, should be allowed to be substituted therefor.

In consequence, it is manifest that the Court of Appeals below has rendered a decision which is in direct conflict with the decisions of this Court.

POINT III.

There is irreconcilable conflict of opinions of the Courts below wherein the Court of Appeals has substituted the doctrine of comity for a dispositive finding of fact by the Trial Court, which finding was not and could not have been found to be erroneous on the record before the Court of Appeals, and should have been regarded as "unassailable".

As above pointed out, the Trial Court found that the two Sutherland patents were for the same invention, with the consequence, under the dictate of the decisions of this Court, that the second patent was wholly void. This finding of fact by the Trial Court was "unassailable" in the Court of Appeals unless it was manifestly erroneous (*Adamson* v. *Gilliland*, 242 U. S. 350; see also U. S. C. A. Title 28, Sec. 879; R. S. 1011; 18 Stat. 318). Obviously, that finding of fact was dispositive of the case. The Court of Appeals found no error in the finding. It was neither modified nor reversed—nor could it have been on the record before the

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* *Otis Elevator Co.* v. *Portland Co.*, 127 Fed. 557 C. C. A. (1st);
Gold v. *Gold*, 187 Fed. 273 C. C. A. (2nd);
Lyon Fastener Inc. v. *Hookless Fastener Co.*, 72 Fed. (2nd) 981 C. C. A. (3rd);
Remington Rand Service v. *Acme Card System Co.*, 71 Fed. (2nd) 628 C. C. A. (4th);
Wire Bound Patents v. *Saranac*, 65 Fed. (2nd) 904 C. C. A. (6th).

Court. The Court of Appeals merely substituted the doctrine of comity for the indisputable consequence and effect of the fact finding. This, it is submitted, constitutes manifest error warranting review and correction by this Court.

POINT IV.

Petitioners have been deprived of their constitutionally guaranteed right to an adjudication of the sufficiency and justice of their defense to a charge of patent infringement.

By substituting the doctrine of comity for the fact finding of the Trial Court, and the adjudication based thereon, the Court of Appeals has deprived petitioners of their day in Court to which they have the guarantee of the Constitution. The defense they have raised to a challenge to their exercise of their natural rights as members of the public, has not been adjudicated on its merits. To the contrary, the merits of their cause have been disposed of by the Court of Appeals upon a decision of another Court, in a case in which they were not involved and in which they had no voice, and on a record which is not even before the Court of Appeals below to enable determination by anyone of what it comprised. The doctrine of comity was intended for no such thing, nor should it be allowed to accomplish any such result. Moreover, that doctrine should not be countenanced to perpetuate judicial error—an inevitable consequence of its application in the manner it has here been applied, as is illustrated by the facts of this case.

The District Court, though according respectful consideration to the prior decision of the Court of Appeals for the Second Circuit, found on the record before him that the established facts necessitated a different conclusion from

that reached by the Court of Appeals for the Second Circuit. He accorded the doctrine of comity every consideration to which it was entitled; he accorded defendants their day in Court and an adjudication on the merits of the defense they had raised; he *found as a fact* that the two Sutherland patents were for the same invention, and that the patent in suit was invalid because thereof.

The Court of Appeals, however, did none of these things. To the contrary, it ignored the record in the case; it ignored the fact findings of the Trial Court, and substituted the doctrine of comity therefor, thus forever binding petitioners by a decision rendered in a case to which they were not parties, on evidence of which the Court itself is not informed, thereby making it possible—and in this case an established fact—to perpetuate judicial error and avoid conflict of opinion and review by this Court, a procedure which the Federal Judicial System contemplated and provided for.

Particularly apt is the language of Judge Borquin in *Lektophone* v. *Rola* (27 Fed. (2d) 758), upon whom was urged the doctrine of comity founded on the prior decision of the Court of Appeals for the Third Circuit in *Lektophone Corp.* v. *Brandes Corp.*, 20 Fed. (2d) 155, which had held the patent there in suit to be valid and infringed. He stated (p. 761):

> "If otherwise alike, that case and this differ in judgment, which suffices to forbid conformity merely to comply with the rule of comity urged.
>
> Too often is the rule invoked to extend the operation of erroneous decisions, and to defeat review by the Supreme Court, or for the sake of appearances, and face-saving. Justice is more than these latter—is the substance whereof they are the shadows sometime distorted. To change judgment out of mere comity is perversion of judicial function and defeat

> of justice. And yet it is done whenever the facts and findings in one patent case are taken into account in another, to the prejudice of a party in the latter who is a stranger to the former. See Carson, etc., Co. v. Anaconda Copper Mining Co. (D. C.) 17 F. (2d) 816; Id. (C. C. A.) 26 F. (2d) 651. For this judicial rule, peculiar to patent cases tried in equity, is no justification in principle."

It is of interest to note that the decision of Judge BORQUIN in that case, which refused to follow the prior decision of the Third Circuit Court of Appeals under the doctrine of comity, was affirmed both by the Ninth Circuit Court of Appeals (34 Fed. (2d) 264) and by this Court (282 U. S. 168).

It is believed, therefore, that the error of the Court of Appeals below is manifest, and its judgment should be reviewed and corrected by this Court.

Conclusion.

Wherefore petitioners earnestly pray that the petition for writ of certiorari be granted, the case be reviewed, and the decree of the Court of Appeals for the Fifth Circuit finding validity for Sutherland Patent No. 1,539,701 be reversed.

Respectfully submitted,

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Dated: July 1, 1941.

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RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF A WRIT OF CERTIORARI.

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RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF A WRIT OF CERTIORARI.

Argument.

1. The Single Issue.

The Petitioners in these cases request this Court to grant a writ of certiorari and review the defense of double patenting as applied to the Sutherland Patent at bar. In the final analysis, this is the only matter presented by their petition and supporting brief.

The defense of double patenting, though raised whimsically against Sutherland in several litigations, has never been sustained by any court and has been definitely rejected by two Circuit Courts of Appeals—not to mention District Courts. While reviewing this matter in the cases at bar, Judge McCord said for the Fifth Circuit Court of Appeals:

> "This issue of double patenting by Sutherland was tried and found in favor of the patentee over twelve years ago by the United States District Court for the Southern District of New York. This decision was affirmed by the Second Circuit Court of Appeals on November 4, 1929, *Novadel Process Corporation* v. *J. P. Meyer & Co.*, 35 F. 697. That court found, 'The inventor's two patents are for distinct subject matters'. It further upheld all the claims involved in the cases at bar.
>
> The worth and validity of the invention described in Patent No. 1,539,701 (to Sutherland) has been recognized and accepted by the trade for many years, and it is clear that Sutherland did make an invention of far reaching importance to the manufacturers of flour, meal, and other edible cereal products. Moreover, the presumption of validity arising from the issuance of the letters patent was greatly reinforced by the clear-cut decision of the Second Circuit Court of Appeals in the *Meyer* case, *supra*, which decision has stood the test of time for twelve years. The patent in suit has only one more year to run and we see no good reason for departing from the decision of the Second Circuit Court of Appeals and declaring the patent invalid at this late date." (R. 397-8).

There are, indeed, no reasons of any character for disturbing a judgment in favor of the Sutherland Patent. Infringement of this patent was *admitted* by both of the Petitioners in open court. (R. 61, 64, 122, 154). Validity was only questioned on the single ground of double patent-

ing,[1] already mentioned. This defense had been previously decided in favor of the patent as the result of litigation in the Second Circuit that involved parties with whom Petitioner Penn, who manufactures and sells to Petitioner Tex-O-Kan and furnishes instructions for infringement, has some type of privity;[2] *and Petitioners offered no new evidence.* So far as this particular defense was concerned, they did not present one syllable of testimony and did not offer any other evidence except the Sutherland Patents

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[1] Sutherland also was challenged for a so-called failure to disclaim, but this defense constituted a subsidiary part of the defense of double patenting and necessarily fell with that defense. No question about disclaimers has been presented to this Court.

[2] Shortly after Novadel Process Corporation sued J. P. Meyer & Co. in New York, J. P. Meyer & Co. was supplanted by American Purifyne Co., which appeared as the real defendant and took the appeal to the Second Circuit Court of Appeals. One of the directors and moving factors in American Purifyne Company was Archie Gulbenkian; and he was naturally enjoined along with his company. Subsequently, Kerope Gulbenkian, who was a brother of Archie Gulbenkian and had an office with him in New York City, began to infringe (R. 56, 261-7). Kerope Gulbenkian attempted to justify his activities by reference to the fact that he owned or controlled a patent to Schotz; but the District Court for the Southern District of New York enjoined him from infringing Sutherland, as will appear from an opinion rendered by Judge Coxe (R. 255-7). Petitioner Penn has obtained an exclusive license under the Schotz patent from Kerope Gulbenkian and has *admittedly* opened another infringing business (R. 268-72). While Penn will not pay a royalty to Respondent under the Sutherland Patent though he has been offered a license (R. 293-4), he does pay a royalty to Kerope Gulbenkian, who has been enjoined from conducting a similar infringement in his own name. *In the case at bar*, Penn filed a counterclaim against Respondent on the Sutherland Patent *and Kerope Gulbenkian joined in this counterclaim*, but the counterclaim was dismissed before trial. (R. 16-21, R. 54-6).

and a file wrapper of one of them.[3] While all of the burdens on questions of validity necessarily rested with them, *Mumm v. Jacob E. Decker & Sons*, 301 U. S. 168, 171 (1937), they failed for reasons quite obvious in view of their very unsatisfactory proofs (and now complain against their own failure) to offer the Record in the case in which the Second Circuit Court of Appeals overruled the defense of double patenting and to try to distinguish from the facts there involved as set forth in the opinion in that case.

2. No Double Patenting.

The evidence actually introduced on this subject in the cases at bar firmly establishes the conclusion that there was no double patenting. With regard to the salient facts bearing on this matter, we note that the petition and supporting briefs filed by our opponents are surprisingly inaccurate and inadequate.

Over a period of years, Sutherland made several different inventions in the art of bleaching flour with peroxides. There are, of course, other means well known to the trade for accomplishing any desired bleaching result in the manufacture of flour, as will appear, for instance,

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[3] In addition to the Sutherland Patent, these cases involved a patent to Kroeber with regard to which numerous issues were tried, and the Kroeber Patent was held invalid. These cases also involved certain issues against Sutherland that did not bear on validity or infringement and that have not yet been decided by the District Court or the Circuit Court of Appeals, though the cases *have been remanded to the District Court for a decision of those issues.* During the trial, considerable evidence was offered on these various matters; and this fact explains the size of the Record despite a complete lack of evidence from Petitioners on the issue of double patenting except for the few exhibits that we have expressly mentioned.

from the discussion by the Eighth Circuit Court of Appeals in the case of *Naylor* v. *Alsop Process Co.*, 168 F. 911 (1909).

Sutherland secured two patents, one of which contained certain claims drawn to a genus and the other of which contained only claims drawn to a species and to a sub-species of the genus. The former patent is not in suit. The cases at bar do not, in fact, involve any claims except four narrow ones that were drawn specifically to a small sub-species in the latter patent, which sub-species was not even disclosed in the former patent; and these claims in suit are the only claims that can properly be involved in the consideration of double patenting in this litigation. *Pyle Nat. Co.* v. *Lewin*, 92 F. (2nd) 628 (C. C. A. 7th, 1937); *Lion Fastener, Inc.* v. *Hookless Fastener Co.*, 72 F. (2nd) 985 (3 C. C. A. 3rd, 1934).

Sutherland filed the application for his first patent on December 12, 1916. This application matured into Patent No. 1,380,334 on May 31, 1921 (R. 361). The patent was later surrendered in return for Reissue No. 16,166, which was granted on July 14, 1925. Reissue No. 16,166 naturally expired on May 31, 1938, which would have been the expiration date for the original Patent No. 1,380,334 (R. 565).

Patent No. 1,380,334 and Reissue No. 16,166 disclosed the basic invention of bleaching flour with peroxides, both organic and inorganic. The specific example furnished by the disclosure was the *inorganic* peroxide known as *hydrogen peroxide*. Under the well-known Rules of the Patent Office, Sutherland was entitled to claim in this application the genus of his invention and *one* species thereof and *one* sub-species of that species. *Patent Office Rule* No. 41; *Ex Parte Eagle*, 1870 C. D. 137. He consequently submitted and obtained claims drawn to the genus of peroxides, the species of *inorganic* peroxides and the sub-species of inorganic peroxides known as *hydrogen peroxide*. He had no claims drawn to *organic* peroxides, much less to some particular *organic* peroxide. (R. 361-8).

The applications on which Patent No. 1,380,334 and Reissue No. 16,166 were granted did not contain any disclosure of the use of *benzoyl peroxide*, which is an *organic* peroxide. After the application for Patent No. 1,380,334 had been filed and was well advanced in the course of prosecution, Sutherland made the remarkable discovery that the use of *minute* quantities of the *powder* known as benzoyl peroxide was particularly efficacious in bleaching flour and would accomplish results very much superior to those obtained from the use of larger quantities of the *liquid* known as hydrogen peroxide or any other inorganic peroxide. This discovery set benzoyl peroxide apart from all of the other numerous chemicals in the large family of peroxides and worked a great change in the art of bleaching flour. (R. 230-1).

Following this discovery or invention, Sutherland filed an application for another patent on November 24, 1920, and his new application matured into Patent No. 1,539,701 in suit on May 26, 1925. Under the established rules of the Patent Office already mentioned, Sutherland was, of course, permitted to prosecute and obtain in Patent No. 1,539,701 a set of claims drawn to the species of *organic* peroxides and the sub-species of *benzoyl peroxide*, to which species and sub-species none of the claims in the application for Patent No. 1,380,334 was drawn or could be drawn. The applications for the two patents were co-pending for a considerable period of time, and cross-references were inserted in each patent for the purpose of establishing sharp lines of division between them. (R. 249, l. 36; 362, l. 48). The same cross-references and the same sharp lines of distinction between the claims involved in the two different prosecutions were carried forward when Reissue No. 16,166 was granted as a substitute for Patent No. 1,380,334; and the Patent Office thus carefully performed its duties at every step. (R. 366, l. 76). *These facts simply present a typical example of an ordinary situation in which*

the Patent Office has first granted a basic patent and then at a later time has very properly granted a more specific or improvement patent to the same inventor in the same art.

The first Patent No. 1,380,334 was surrendered for reissue in 1922, and Reissue No. 16,166 expired on May 31, 1938. Petitioners are consequently entitled now to the free and unrestricted use of hydrogen peroxide and every other inorganic peroxide known to chemistry. These bleaches have never been covered in any manner by the patent in suit. We might add that, since all of the claims at issue in the cases at bar are limited to the use of benzoyl peroxide, Petitioners are even entitled, so far as the claims in suit are concerned and so far as any matter properly before the Court is concerned, to the free and unrestricted use of every organic (as well as every inorganic) peroxide in the entire field of chemistry *with the single exception of benzoyl peroxide, which was not even mentioned or vaguely suggested in Sutherland's first patent or his reissue, and which belongs exclusively to his patent in suit that will not expire until May 26, 1942.*

Under these circumstances, all of the claims in Sutherland's second patent—notably those claims which are in suit and which are restricted to benzoyl peroxide and with which this Court must be exclusively concerned in the cases at bar—cover "a separate invention, distinctly different and independent from that covered by the first patent"; and double patenting has consequently never existed under the doctrine of *Miller* v. *Eagle Manufacturing Company*, 151 U. S. 186 (1870), which has been cited in the brief for Petitioners (p. 14). Numerous other cases dealing with fact situations closely similar to those presented by the cases at bar clearly establish the conclusion that the defense of double patenting must fail. *Traitel Marble Co.* v. *U. T. Hungerford Brass & Copper Co.*, 22 F. (2nd) 259 (C. C. A. 2nd, 1927); *Thomson-Houston Electric Co.* v. *Ohio Brass Co.*, 80 F. 712, 726 (C. C. A. 6th, 1897);

Standard Brands v. *Federal Yeast Corporation*, 38 F. (2nd) 329, 343 (D. C. Md., 1930); *Patents, Inc.* v. *Gillette Safety Razor Co.*, 28 F. Supp. 666, 670 (D. C. Del., 1939).

Petitioners have repeatedly made a statement in their petition and supporting brief to the effect that the District Court before which the cases at bar were tried made a "*finding of fact* that the two Sutherland Patents were for the same invention" (p. 17). Though this bold assertion appears at least a dozen times, and every proposition advanced by Petitioners is predicated thereon, *no supporting reference to the Record is ever furnished at any place.* This seems strange, but the reason is clear. *The District Court did not make any such alleged finding of fact*, as will readily appear from a glance at his Findings of Fact, which have, of course, been printed in the Record. (R. 239-41). Any such opinion by the Trial Court on this subject (necessarily deduced exclusively *from an attempted interpretation of two written documents*) would not in any event be other than *a mere conclusion of law*—an erroneous conclusion of law, as two Circuit Courts of Appeals have decided.

The District Court, as a matter of fact, did not even sustain the defense of double patenting. He did no more than advance in his preliminary *legal opinion* (R. 237) the strange view that Sutherland's second patent *expired* when the reissue of his first patent expired—which was, of course, impossible as a matter of law. This legal conclusion with regard to *expiration dates* was evidently based on an erroneous impression to the effect that Reissue No. 16,166, which expired on May 31, 1938, was a reissue of Sutherland's *second* patent *rather than* a reissue of his *first* patent. (R. 237). This error has been corrected by the decision of the Fifth Circuit Court of Appeals.

Petitioners have placed great emphasis in their brief (p. 12) on a comparison between Claim 10 of Sutherland's

Patent No. 1,539,701 at bar, and Claim 32 of Reissue No. 16,166. There are many complete answers to the argument thus advanced. In the first place, these claims are not in suit and their status cannot have any bearing on the question as to whether the claims that are actually in suit do involve double patenting. *Pyle Nat. Co.* v. *Lewin, supra; Lion Fastener, Inc.* v. *Hookless Fastener Co., supra.* In the second place, Claim 10 of Patent in suit No. 1,539,701 is limited to the use of a "true peroxide *as such*", and this phrase has been defined by the specifications of the patent (R. 249, l. 4), to mean a dry or powdered peroxide (like benzoyl peroxide) as distinguished from liquid peroxides (like hydrogen peroxide and other inorganic peroxides)—all with the result that Claim 10 of Patent No. 1,539,701 constitutes a claim to a species, while Claim 32 of Reissue No. 16,166 constitutes a claim to a genus. In the third place, Claim 10 of Patent No. 1,539,701 (like all of the other claims therein) must be limited by the specifications of the patent to organic peroxides, even to organic peroxides belonging to the acyl group, as set forth in the opinion rendered by the Second Circuit Court of Appeals in the case of *Novadel Process Corporation* v. *J. P. Meyer & Co.*, 35 F. (2nd) 697, 700 (1929); and this fact further distinguishes the claim from the broad and generic claim 32 of Reissue No. 16,166. In the fourth place, Claim 32 of Reissue No. 16,166 was granted for the first time at the date of the reissue on July 14, 1925, and consequently came into existence subsequent to Claim 10 of Patent No. 1,539,701, which was granted on May 26, 1925—all with the result that, under the doctrine announced by this Court in the case of *The Barbed Wire Patent*, 143 U. S. 275, 281 (1892), Claim 32 of the subsequent Reissue No. 16,166 would fall rather than Claim 10 of the earlier Patent in suit No. 1,539,701, *if* there were any double patenting.

With a similar disregard for pertinent facts,[4] Petitioners have asserted in their petition (p. 2) that the Sutherland Patent in suit could have been issued on January 24, 1921 (i. e., two months after the filing date), but "Respondent deliberately refrained from allowing this application to issue as a patent for a period of more than four years thereafter, to thereby prolong the monopoly". The application was only in its initial stages on the date mentioned and was subsequently prosecuted through a number of office actions. More than half of the claims that appear in the patent were proposed and debated and finally granted subsequent to the date of January 24, 1921, and other claims were amended in important respects. The attempted stricture on Respondent, or rather on one of Respondent's predecessors in title, is consequently not justified. (Dx. 5, Physical).

3. The Public Importance.

Petitioners have erroneously stated that this litigation involves a matter of "great public importance". As support for their thesis, they rely on the fact that the patent in suit relates to one of the steps sometimes employed in the manufacture of a certain type of flour. We should observe, however, that the royalty which has always been charged by Respondent under its patent in suit that is now approaching expiration has *only* been thirty cents per pound of bleaching compound and that this bleaching com-

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[4] Petitioners have stated in their petition (p. 3) that the cost of the bleaching composition sold by Petitioner Penn represents a saving of 66-2/3% to the millers as compared with the cost of the bleaching composition sold by Respondent. This is an exaggeration evidently made for some ulterior purpose. The ratio is $1.25 to $1.95, which means that Petitioner Penn has raided Respondent's market with a 35% reduction in cost. (R. 241).

pound is *only* used in very minute quantities—all with the net result that the royalty is *only* about one cent per barrel of flour or even less in some cases. (R. 217). The average person in the United States eats considerably less than one barrel of bleached flour per annum; and his royalty is, therefore, considerably less than one cent per annum, in the event that his flour has been bleached by Respondent's process. As a matter of fact, almost one-half of the mills in the United States employ other methods of bleaching that are not covered by Respondent's patent (R. 241), and the statement in Petitioners' brief (p. 11) to the effect that "the subject matter of this case consists of a necessary and universally used treatment of flour" is not correct. These facts show that the patent relates to a narrow and competitive art and that the true measure of public importance is quite small.

Conclusion.

For all of the foregoing reasons, we submit that the petition for a writ of certiorari in these cases should be refused.

Respectfully submitted,

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Dated: August 15, 1941.

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SEP 6 1941

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1941

No. 233

FREDERIC H. PENN, doing business under the name and style of SUPERLITE COMPANY,
Petitioner,
vs.
NOVADEL-AGENE CORPORATION,
Respondent.

TEX-O-KAN FLOUR MILLS COMPANY,
Petitioner,
vs.
NOVADEL-AGENE CORPORATION,
Respondent.

REPLY BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SAMUEL E. DARBY, JR.,
Counsel for Petitioners.

ROBERT A. RITCHIE,
LOUIS D. FLETCHER.

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REPLY BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Respondent's brief in opposition to the grant of a writ of certiorari in this case necessitates brief comment.

I.

The issue presented by this case—viz: whether or not the public may be restrained from utilizing the invention, of an expired patent by means of a second unexpired patent subsequently issued to the same patentee for the same invention—is termed by respondent "double patenting".

Regardless of by what name the issue is termed, respondent seeks to avoid a corrective review of the case by this

Court by initially admitting (Brief, p. 2) that the issue had been raised "whimsically" in *another* litigation between *different* parties. Obviously, the wholly casual judgment of the earlier Court on this "whimsically" raised issue in the prior litigation is in no sense comparable to the *deliberate and considered* judgment of Judge ATWELL on this issue most seriously and earnestly raised and pressed in the present case. Notwithstanding this fact, however, respondent then argues that the prior judgment should not be disturbed, but should be given the practical effect of the doctrine of *res judicata,* despite the fact that not a single prerequisite to the applicability of the doctrine is here present.

Then, in apparent realization of the violence its argument does to the doctrine in view of the fact that neither of petitioners ever, in the slightest sense or to the slightest extent, were involved in the prior litigation, the assertion is made (Brief, p. 3) that "some type of privity" exists between petitioner Penn and the defendant in the prior litigation. This statement of respondent is entirely and deliberately untrue. The prior litigation terminated with the opinion of the Court of Appeals for the Second Circuit in 1929. Petitioner Penn entered this industry in 1933 (R. 151). When he had developed his product to a commercial stage he had a patent search made which revealed a Schotz patent, owned by one Kerope Gulbenkian (who, we now learn, had been a defendant in the prior 1929 litigation), and an Avedikian patent (the patentee of which, we now learn, had testified as a witness in the prior litigation). Mr. Penn individually sought out these two patent owners, who were entirely unknown to him, and acquired an exclusive license under the Schotz and Avedikian patents because he believed them to be of value to him in his enterprise. This was the first and only time he has ever had personal contact with either of

these gentlemen (R. 155, 156). Despite these simple facts, *which were in no respect disputed,* and could not have been, respondent makes the deliberate, untrue statement above quoted. This illustrates far more eloquently than argument could to what extremes respondent is prepared to go to avoid a corrective review of this case.

II.

Respondent charges (Brief, p. 4) that the petition and supporting brief are "inaccurate" as well as inadequate, but fails to point to a single inaccuracy contained in either thereof, and indeed could not do so.

The only colorable attempt in that direction is the claim that Judge ATWELL did not make a *"finding of fact"* that the two Sutherland patents were for the same invention (Brief, p. 8). That respondent is in error, even in this, will be found on reference to Finding of Fact No. 1 (R. 239), either alone, or in conjunction with the oral remarks of the Court to which the Finding directs attention (R. 237, 238).

In this portion of respondent's brief effort is made to argue the merits of the cause; and there is presented a laborious argument attempting to draw some presumed distinction between *"genus"*, *"specie"*, and *"sub-specie"* of invention, which would set the Sutherland patent in suit apart from all other patents of the United States, and enable its monopoly to continue although that *identical* monopoly had expired with the expiration of the prior patent to the same patentee, as found by the District Court. The fallacy of the contention is believed to be self evident when it is remembered that it was the *monopoly* of the expired patent —*whether broad or narrow*—that passed into the public realm upon its expiration. If, as respondent asserts, the expired patent covered and monopolized *all* organic perox-

ides, then, upon its expiration, the public acquired the right to use *all* organic peroxides. Especially is this so when, as shown by the file history of the application for the expired patent (Defendant's Exhibit 5, physical) its allowance was procured by means of demonstration and tests made with benzoyl-peroxide.* In other words, and as a fact revealed by the documentary records in flat contradiction to respondent's assertion, *it was the use of the particular organic peroxide—benzoyl-peroxide—that procured the allowance of the expired reissue patent.*

Moreover, it is quite obvious that the only difference between a patent claim which covers *all* organic peroxides, and one which specifies but *one* thereof (namely benzoyl-peroxide), is merely a difference in *scope.* Such a difference was *expressly* stated by this Court *not* to give validity to a second patent to the same patentee in *Miller* v. *Eagle Manufacturing Company,* 151 U. S. 186 at page 198:

> "* * * it must distinctly appear that the invention covered by the later patent was a separate invention, distinctly different and independent from that covered by the first patent; in other words, it must be something substantially different from that comprehended in the first patent. *It must consist of something more than the mere distinction of the breadth and scope of the claims of each patent.*"

III.

Respondent finally seeks to minimize the public importance of the case by arguing that the royalty it has levied (and seeks to continue to levy), upon the American public

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* See the argument of April 27, 1923, with comparative charts and supporting affidavits.

is "*only* about one cent per barrel of flour" (emphasis respondent's). This, indeed, is a specious argument in opposition to a petition for a writ of certiorari to secure a review by this Court of a case which puts in issue the legality or right of levying *any* tribute on the public *through sixteen hundred millers* (R. 74), particularly in connection with bread—a daily necessity of life. If, as a matter of principle, a royalty is justified at all, respondent would be in a position to levy *any* tribute it might arbitrarily set.

Conclusion.

It is submitted as quite apparent that where a litigant is compelled to go to the extremes to which respondent is driven in its brief in the foregoing respects to which we confine our comments, there indeed, must be merit in the opposing cause sufficient to warrant, for the public interest, a review by this Court of the issue in controversy.

Therefore, the grant of the petition is most earnestly urged.

Respectfully,

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ROBERT A. RITCHIE,
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